

No. 92-1402

Supreme Court, U.S.

FILED

AUG 20 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1993

— C & A CARBONE, INC., RECYCLING PRODUCTS
OF ROCKLAND, INC., C & C REALTY, INC., and
ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

— ♦ —
On Writ Of Certiorari To The Supreme Court,
Appellate Division, Second Department
Of The State Of New York
— ♦ —

BRIEF OF THE STATE OF NEW JERSEY
AS AMICUS CURIAE IN
SUPPORT OF THE RESPONDENT
— ♦ —

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for Amicus Curiae,
State of New Jersey
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Tel.: (201) 648-3124

MARY C. JACOBSON
Assistant Attorney General
Of Counsel

CARLA VIVIAN BELLO
Senior Deputy Attorney General
Counsel of Record and on the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

2500

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
<p>LOCAL WASTE FLOW DIRECTIVES SUCH AS THOSE OF CLARKSTOWN AND NEW JERSEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES</p>	
<p>A. Local Waste Directives are not Acts of Eco- nomic Protectionism which are <i>per se</i> Invalid Under the Commerce Clause nor are They Attempts to Hoard Natural Resources.....</p>	10
<p>B. Under <i>Pike</i> Balancing, the Legitimate Gov- ernmental Interests Advanced by Local Waste Flow Directives Outweigh the Incidental Effect Upon Interstate Commerce.....</p>	13
<p>C. There are no Adequate Alternatives to Con- trol of Local Waste Flow</p>	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

I. CASES

<i>A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't.</i> , 90 N.J. 666, 449 A.2d 516 (1982).....	3, 15
<i>Borough of Glassboro v. Gloucester Board of Chosen Freeholders</i> , 100 N.J. 134, 495 A.2d 49 (1985).....	15
<i>California Reduction Company v. Sanitary Reduction Works</i> , 199 U.S. 306 (1905).....	15
<i>Central Iowa Refuse System, Inc. v. Des Moines Metropolitan Solid Waste Agency</i> , 715 F.2d. 419 (8th Cir. 1983)	15
<i>Chemical Waste Management, Inc. v. Hunt</i> , 112 S.Ct. 2009 (1992).....	14
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	3, 11, 14
<i>Elizabeth v. State Dept. of Env'tl. Protect.</i> , 198 N.J. Super. 41, 486 A.2d 356 (1984)	16
<i>Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist.</i> , 643 F.Supp. 127 (D.Or.1986), <i>aff'd</i> 820 F.2d 1482 (9th Cir. 1987).....	17
<i>Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources</i> , 112 S.Ct. 2019 (1992)	9, 14
<i>Foster Fountain Packing Co., Inc. v. Haydel</i> , 278 U.S. 1 (1928)	12
<i>Gardner v. Michigan</i> , 199 U.S. 325 (1905).....	8, 15
<i>H.P. Hood & Sons, Inc. v. DuMond</i> , 336 U.S. 525 (1949)	12
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794 (1976)	17

TABLE OF AUTHORITIES - Continued

Page

<i>Huron Portland Cement Co. v. City of Detroit</i> , 362 U.S. 440 (1960)	8
<i>J. Filiberto Sanitation v. Dept. of Envir. Prot.</i> , 857 F.2d 913 (3rd Cir. 1988).....	5, 16
<i>Kassel v. Consolidated Freightways Corp.</i> , 450 U.S. 662 (1981)	8
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	11, 13
<i>Matter of Fiorillo Bros. of New Jersey</i> , 242 N.J. Super. 667, 577 A.2d 1316, <i>certif. denied</i> , 122 N.J. 363, 585 A.2d 371 (1990)	6, 16
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	8, 9, 14, 15, 16
<i>New Energy Co. of Indiana v. Limbach</i> , 486 U.S. 269 (1988)	11
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	9, 10, 11, 13, 17
<i>Raymond Motor Transportation, Inc. v. Rice</i> , 434 U.S. 429 (1978)	14
<i>Reeves, Inc. v. Stake</i> , 477 U.S. 429 (1980)	12, 13
<i>Shanye Bros., Inc. v. District of Columbia</i> , 592 F.Supp. 1128 (D.D.C. 1984).....	17
<i>So. Ocean Landfill v. Mayor & County of Tp. of Ocean</i> , 64 N.J. 190, 314 A.2d 65 (1974)	3
<i>South Central Timber Development, Inc. v. Wunnicke</i> , 467 U.S. 82 (1984)	12
<i>Sporhase v. Nebraska</i> , 458 U.S. 941 (1982).....	13
<i>State v. New Jersey Trade Waste Ass'n</i> , 96 N.J. 8, 472 A.2d 1050 (1984).....	7, 18

TABLE OF AUTHORITIES – Continued

	Page
<i>Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.</i> , 770 F.Supp. 775 (D.R.I. 1991), <i>aff'd</i> 947 F.2d 1004 (1st Cir. 1991).....	17
<i>Swin Resource Systems, Inc. v. Lycoming County</i> , 883 F.2d 245 (3rd Cir. 1989), <i>cert. denied</i> , 493 U.S. 1077 (1990).....	17
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948).....	12
<i>Trade Waste Management Association v. Hughey</i> , 780 F.2d 221 (3rd Cir. 1985).....	7, 18
<i>Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority</i> , 814 F.Supp. 1566 (M.D. Ala. 1993).....	17
<i>Waste Systems Corp. v. County of Martin</i> , 985 F.2d 1381 (8th Cir. 1993).....	17
 II. STATUTES	
<i>N.J.S.A. 13:1E-1 et seq.</i>	4
<i>N.J.S.A. 13:1E-19</i>	5
<i>N.J.S.A. 13:1E-21</i>	5
<i>N.J.S.A. 13:1E-99.32 et seq.</i>	4
<i>N.J.S.A. 48:2-23</i>	4
<i>N.J.S.A. 48:2-24</i>	4
<i>N.J.S.A. 48:13A-1 et seq.</i>	4
<i>N.J.S.A. 48:13A-5</i>	6

No. 92-1402

In The
Supreme Court of the United States
 October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS
 OF ROCKLAND, INC., C & C REALTY, INC., and
 ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari To The Supreme Court,
 Appellate Division, Second Department
 Of The State Of New York

BRIEF OF THE STATE OF NEW JERSEY
 AS AMICUS CURIAE IN
 SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE

This case involves a challenge to the constitutional validity of a local ordinance enacted by Respondent Town of Clarkstown, New York, which requires all waste generated in Clarkstown to be brought to the Town's designated waste disposal facility, where it is there prepared for shipment out-of-State. This "waste flow control" ordinance was enacted by Clarkstown in the face of the imminent State-ordered closing of a local sanitary landfill

which had previously served Clarkstown's solid waste needs and in anticipation of the implementation of a comprehensive County solid waste management plan. The designated solid waste facility is owned by Clarkstown and operated by a private contractor under agreement with the Town.

Petitioners are holders of a State permit for the operation of a "recycling center" in Clarkstown who have been found by the Court below to have violated Clarkstown's waste control ordinance by operating an unauthorized solid waste transfer station and diverting waste from the designated facility for shipment out-of-State. Petitioners have challenged Clarkstown's waste control ordinance as an act of "economic protectionism" which is *per se* invalid under the Commerce Clause.

The State of New Jersey is vitally interested in this matter because New Jersey's ability to address effectively the environmental and social evils that have long plagued local solid waste collection and disposal activities within its borders is directly dependent upon its ability to manage the flow of locally generated waste.¹ New Jersey's current Statewide solid waste management program is based upon a network of statutes and implementing administrative regulations which require that all locally generated solid waste be ultimately brought to designated local disposal or transfer facilities, all of which are

¹ New Jersey agrees with the arguments made by the State of Ohio and the other states in the *Amicus* brief filed in support of Clarkstown. As one of the states with the most experience in flow control and the most extensive and advanced system of waste regulation, New Jersey is writing separately to put that experience and system before the Court.

franchised public utilities or are owned by government entities. Local waste flow directives have enabled solid waste management in New Jersey to evolve from a predominantly unregulated, private function to a highly sophisticated and interactive program of State and County planning activities, enforcement responsibilities, and expert technical review within a framework of governmental ownership and traditional public utility regulation.

Prior to 1970, most solid waste in New Jersey was collected by private haulers and disposed of at privately owned landfills. Environmental problems mounted and anticompetitive activities dominated what should have been a freely operating competitive market. In addition, New Jersey's growing dependency on rapidly dwindling landfills was threatening to create havoc in the disposal of solid waste. *A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't.*, 90 N.J. 666, 449 A.2d 516 (1982); *So. Ocean Landfill v. Mayor & County of Tp. of Ocean*, 64 N.J. 190, 193, 314 A.2d 65, 66 (1974).

In 1978, a New Jersey statute which attempted to extend the lifespans of existing landfills in the State by banning the importation of out-of-State waste was declared unconstitutional by this Court. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In the wake of that decision, New Jersey was faced with what was, in the words of the *City of Philadelphia* dissenters, an "unsolvable dilemma." *Id.* at 631. The State was running out of landfill space faster than other more environmentally sound, long-term, methods of solid waste disposal could be identified, developed, financed and put into operation.

Stripped of its ability to stem the tide of millions of tons of out-of-State waste coming into the State, New Jersey embarked on a massive planning effort to take control of locally generated waste and thus reduce its own demands on its dwindling landfills. Far from attempting to isolate itself from a national problem, New Jersey decided to become part of the solution. New Jersey's efforts in this regard are grounded in the State's Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* (the "Solid Waste Management Act"), which addresses the environmental and planning aspects of proper solid waste collection and disposal, and in New Jersey's Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 *et seq.* (the "Utility Control Act"), which removes solid waste collection and disposal from the purely private sector and subjects all such activities to public utility regulation. In addition, under the Statewide Mandatory Source Separation and Recycling Act, (the "Recycling Act"), N.J.S.A. 13:1E-99.32 *et seq.*, New Jersey has intensified its recycling efforts so as to reduce the amount of waste generated in the State.

These enactments enable New Jersey to address both the environmental and economic aspects of local solid waste collection and disposal. New Jersey's citizens are assured solid waste services rendered by public utilities which are statutorily obligated to provide "safe, adequate and proper service." N.J.S.A. 48:2-23. These services may not be discontinued without specific State authorization. N.J.S.A. 48:2-24. The Solid Waste Management Act, the Utility Control Act and the Recycling Act are administered by the New Jersey Department of Environmental Protection and Energy (the "NJDEPE").

Pursuant to regulations issued by the NJDEPE, all waste generated in New Jersey is ultimately directed to designated intermediate or final disposal facilities. These waste flow directives reflect the State reviewed and approved solid waste planning determinations of each County in New Jersey, as well as those of a statutory environmental zone known as the Hackensack Meadowlands, all of which are designated solid waste planning "districts" under the Solid Waste Management Act. N.J.S.A. 13:1E-19, N.J.S.A. 13:1E-21. Only waste generated in New Jersey is subject to direction and no attempt is made by New Jersey to direct waste merely being processed in, or being transported through, New Jersey. Consequently, if mixed waste is brought into New Jersey from out-of-State for the removal of recyclables, the solid waste residue from that process is not subject to New Jersey's waste flow laws. Similarly, New Jersey's locally generated waste may be taken out-of-State for sorting of recyclables as long as the residual solid waste is returned to New Jersey.

Currently, a small percentage (18%) of New Jersey's locally generated waste is directed to intermediate transfer facilities where it is prepared for shipment by such facilities to out-of-State disposal sites. These technologically advanced transfer facilities or "stations," as they are commonly known, have served as a critical bridge between the State's previous dependency on landfilling and the implementation of resource recovery and recycling programs. New Jersey's direction of locally generated waste in this manner has been judicially upheld against Commerce Clause challenges in *J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913 (3rd Cir. 1988),

and in *Matter of Fiorillo Bros. of New Jersey*, 242 N.J. Super. 667, 577 A.2d 1316, certif. denied, 122 N.J. 363, 585 A.2d 371 (1990).

In addition to the planning authority vested in the NJDEPE under the Solid Waste Management Act, the Utility Control Act authorizes the NJDEPE to award solid waste disposal franchises and to require that all solid waste generated within a franchise area be disposed of at the designated franchised solid waste facility. N.J.S.A. 48:13A-5.²

For many years now, the direction of locally generated solid waste through the planning procedures of New Jersey's Solid Waste Management Act and Utility Control Act has served as the cornerstone of solid waste management activities in the State. By means of local waste flow direction, New Jersey has been able to plan for and ensure the proper disposal of locally generated solid waste. Far from operating so as to benefit local private industry, New Jersey's waste flow directives exist to further a statutorily created solid waste management program which has merged governmental entities and regulated public utilities in an intricate combined effort to render an essential governmental service.³

² This franchising authority was initially vested in the former New Jersey Board of Public Utilities. However, by gubernatorial executive order this authority was transferred to the NJDEPE.

³ In order to construct the solid waste disposal facilities necessary to handle locally generated waste, governmental entities in New Jersey have issued an aggregate of 1.6 billion dollars in revenue bonds. The capital intensive nature of solid waste

In addition to enabling the State to plan for and provide facilities necessary for the long-term disposition of locally generated waste, the ability to direct local waste flow has served New Jersey well in addressing another of the State's historical problems in this area, *i.e.*, illegal dumping. Since solid waste collection rates are set by the State and reflect service costs, comparison of the tonnage records of a designated disposal facility with the customer billings submitted in support of a collector's rate filings facilitates the detection and deterrence of illegal dumping activities.

The ability to direct the flow of locally generated waste has enabled New Jersey, through its political subdivisions and its regulated public utilities, to provide coordinated, environmentally advanced, Statewide solid waste services. Because of this coordinated program, New Jersey has also been able to remedy social evils associated with an industry long dominated by organized criminal influences. See *Trade Waste Management Association v. Hughey*, 780 F.2d 221, 223 (3rd Cir. 1985). *State v. New Jersey Trade Waste Assn.*, 96 N.J. 8, 472 A.2d 1050 (1984). A coordinated State supervised solid waste program has also served to eliminate opportunities for "cream-skimming," a practice by which private industry would choose to serve only the more profitable customers.

services requires the establishment of waste flow franchises. Such franchises are, therefore, no different than those established with respect to other more traditional public utility services.

It is of great concern to New Jersey, therefore, that the ability of local government to direct the flow of locally generated waste within its borders be upheld by this Court. A ruling striking down Clarkstown's local waste flow ordinance would cast serious doubt upon the validity of New Jersey's current waste flow program and would seriously impede New Jersey's ability to take control of and remedy solid waste problems of the most significant local concern.

SUMMARY OF THE ARGUMENT

The collection and disposal of local waste is one of the most basic and essential functions of local government. It has been described as one of local government's "controlling" obligations, involving as it does the protection of the public health and welfare. *Gardner v. Michigan*, 199 U.S. 325, 332 (1905). Indeed, the management of local solid waste collection and disposal has been recognized by this Court as being encompassed within the inherent police powers reserved to state and local governing bodies. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). States have traditionally been accorded broad latitude in the exercise of their police powers. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960). A state's authority to regulate commerce "is never greater than in matters traditionally of local concern." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981).

The primary purpose of local waste flow control laws, such as those in place in Clarkstown and in New

Jersey, is to direct the flow of locally generated waste from point of generation to point of final disposition in an orderly and environmentally sound manner, and to allocate this flow in such a way as to ensure the long-term availability and optimum operation of essential collection and disposal services. The direction of locally generated waste in this manner and for these significant governmental purposes is not an act of economic protectionism and, consequently, should be upheld under the Commerce Clause. Surely, local laws which are in furtherance of basic governmental responsibilities are not the type of local acts which have been held to be *per se* invalid under Commerce Clause analysis. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 472.

The more appropriate standard by which to evaluate the validity of local waste flow laws is that set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this standard, where a local enactment operates evenhandedly to effectuate a valid local public interest and its effects upon interstate commerce are merely incidental, the local enactment will be upheld unless the burden imposed upon interstate commerce is found clearly excessive in relation to the local interest advanced. *Id.* at 142.

Local waste flow laws impose no burden upon interstate commerce. They direct only locally generated waste. In addition, they apply evenhandedly to in-state and out-of-state solid waste haulers who are equally prohibited from diverting locally generated waste from designated in-state facilities. These limited export bans are, therefore, significantly different from the import bans struck down in *City of Philadelphia* and *Fort Gratiot Sanitary Landfill*,

Inc. v. Michigan Department of Natural Resources, 112 S.Ct. 2019 (1992).

With respect to the local benefits furthered by such local waste flow laws, those go far beyond the fact that they ensure the economic viability of such facilities. Other significant local objectives furthered by local waste flow laws encompass rational long-range planning efforts, traffic reduction, the detection of illegal dumping activities, the ability to adjust waste flows quickly in the face of a temporary or permanent closing of a local facility, and maintenance of optimum operating levels at designated facilities. In view of the numerous legitimate governmental functions facilitated by local waste flow laws, *Pike* balancing supports the validity of these directives.

ARGUMENT

LOCAL WASTE FLOW DIRECTIVES SUCH AS THOSE OF CLARKSTOWN AND NEW JERSEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

A. Local Waste Directives are not Acts of Economic Protectionism which are *per se* Invalid Under the Commerce Clause nor are They Attempts to Hoard Natural Resources.

This Court has consistently held that the level of scrutiny that a court must give to a local regulation challenged under the Commerce Clause of the United States Constitution depends upon whether it patently discriminates against interstate commerce or is merely

burdensome. See *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-274 (1988); *City of Philadelphia v. New Jersey*, 437 U.S. at 624. When patent discrimination is involved, the regulation will be subjected to heightened scrutiny and a "virtually *per se* rule of invalidity" will be applied. *Id.* However, when a regulation serves a legitimate local governmental interest it will be invalidated only if its incidental burden upon interstate commerce is clearly excessive when weighed against the benefits it confers upon the state promulgating it. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

To be judged *per se* invalid, therefore, a local waste flow directive would have to be found to have been "motivated solely by a desire to protect local industries from out-of-state competition" or, regardless of intent, to discriminate arbitrarily against interstate trade in its effect. *Maine v. Taylor*, 477 U.S. 131, 148, n.19 (1986). There is no such motivation underlying local waste flow laws nor any such effect. What is being protected by such laws is not local private industry, but rather the ability of local government to provide for the orderly and environmentally safe disposition of locally generated solid waste. This is strikingly evident in New Jersey where there exists no purely private solid waste industry that stands to benefit from a directed flow of locally generated waste.

This difference distinguishes waste flow laws from the local enactments found offensive in the "processing" cases cited by Petitioners. In all those cases the intent of the local requirements in question was not the provision of an essential governmental service, but rather the protection of either a local private industry or local employment in that industry. Thus, in *Pike v. Bruce Church, Inc.*,

the offensive law was aimed at promoting the reputation of local growers. 397 U.S. at 143. In *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), local action designed to protect the local milk industry was at issue. In *Foster Fountain Packing Co., Inc. v. Haydel*, 278 U.S. 1 (1928), and *Toomer v. Witsell*, 334 U.S. 385 (1948), local laws requiring the packing of shrimp or fish by local private industry were found constitutionally infirm. Similarly, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the local processing of timber purchased from the State was impermissibly required by the State as a condition of sale. In contrast to these situations, local waste flow laws promote only a legitimate local governmental necessity, not a private in-state economic interest.

Nor are there any similarities between this matter and those cases cited by Petitioners involving the "hoarding" of local natural resources. Garbage shares none of the characteristics commonly attributed to a natural resource. It is not found in nature and it does not serve any of man's most basic human needs. It is not water, land, game, fish, oil, coal, natural gas or timber which local governments possess in greater or lesser abundance as determined by fate. There is also a distinction to be drawn between goods produced naturally and those produced by the exertion of considerable human effort. See *Reeves, Inc. v. Stake*, 477 U.S. 429 (1980), holding that cement was not a natural resource but rather the product of human labor. Ironically, if garbage must be classified, it more readily falls within the latter category since man has gone to considerable lengths to find more and more ways of producing garbage with little, if any, thought given until recently to how to dispose of it properly.

It should be obvious, therefore, that garbage is no more a natural resource being hoarded by local government by means of waste flow laws than was the cement produced at the South Dakota cement factory and sold exclusively to local residents in *Reeves, Inc. v. Stake*. Even were garbage to be accorded the lofty status of a natural resource, however, this Court has recognized a State's right, in certain circumstances, to reserve a resource for the benefit of its citizens. See *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982).

B. Under Pike Balancing, the Legitimate Governmental Interests Advanced by Local Waste Flow Directives Outweigh the Incidental Effect Upon Interstate Commerce.

Given the absence of any attempt at economic protectionism or at the hoarding of a natural resource, this Court should apply the balancing test set forth in *Pike v. Bruce Church, Inc.* in evaluating the constitutional status of local waste flow laws. This Court has stated that "as long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation' . . . it retains broad authority under the Commerce Clause to protect the health and safety of its citizens, and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. at 151. Even where a state statute clearly burdens interstate commerce, it will not be struck down under the Commerce Clause if the burden is demonstrably justified by a legitimate factor unrelated to economic protectionism. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

In the case of local waste flow laws, there exists no discrimination against interstate commerce. New Jersey's waste flow laws direct only locally generated waste to local facilities where such waste is prepared for transport to final disposal sites. Moreover, the requirement that locally generated waste be brought to designated franchised facilities applies evenhandedly to in-State haulers and out-of-State haulers alike. In addition, both in-State and out-of-State facilities may handle New Jersey waste for processing purposes (e.g., sorting of recyclables), so long as residual waste is returned for disposal pursuant to local waste flow directives. The discrimination against interstate commerce which troubled this Court in *City of Philadelphia, Fort Gratiot and Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 (1992) does not exist here.

Even were this Court to find that interstate commerce is impacted by the operation of local waste flow laws, it should nevertheless conclude that the essential governmental functions served by these laws outweigh the merely incidental effects upon interstate commerce. A critical determination in a Commerce Clause balancing analysis is "the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978). In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 473, a state's interest in environmental protection, resource recovery and solid waste management was found sufficient justification for its prohibition against the sale of milk in plastic containers. This Court, examining the significant governmental concerns underlying such prohibition, held

that the burden placed upon interstate commerce was not excessive in relation to the substantial local interest benefited. *Id.*

That the collection and disposal of local solid waste involves substantial governmental interests of historic local concern should be beyond dispute. See *Gardner v. Michigan*, 199 U.S. at 332; *Minnesota v. Clover Leaf Creamery Co.*, 499 U.S. at 473; *California Reduction Company v. Sanitary Reduction Works*, 199 U.S. 306 (1905). This Court has stated that states have a "substantial state interest in . . . easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 473. The provision of adequate solid waste disposal facilities has been described as "an essential governmental activity." *Central Iowa Refuse System, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d. 419, 428 (8th Cir. 1983). Similarly, New Jersey's highest Court on many occasions has commented upon the magnitude of New Jersey's solid waste dilemma, describing the "rapid disappearance of available solid waste disposal facilities," as one of New Jersey's "most severe problems." *A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't.*, 90 N.J. at 671, 449 A.2d at 519. See also *Borough of Glassboro v. Gloucester Board of Chosen Freeholders*, 100 N.J. 134, 141, 495 A.2d 49, 53 (1985). Any impact upon interstate commerce resulting from New Jersey's or Clarkstown's local waste flow laws pales in comparison to the vital governmental functions being served and, at most, is merely incidental to the performance of those functions.

Not only is any impact upon interstate commerce incidental, but it is so minimal as to be virtually non-

existent. In *J. Filiberto Sanitation v. New Jersey Dept. of Envir. Prot.*, 857 F.2d at 922, the constitutionality of New Jersey's waste flow laws was upheld against a Commerce Clause challenge by a local solid waste hauler. The Third Circuit Court stated that New Jersey's waste flow laws "place the burden of alleviating the trash problem upon New Jersey's residents" and do not burden interstate commerce. *Id.* at 921. Moreover, the Court of Appeals, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17, concluded that "the existence of substantial in-state interests harmed by a regulation is 'a powerful safeguard' against legislative discrimination." *Id.* Similarly, in *Matter of Fiorillo Bros. of New Jersey*, 242 N.J. Super. at 680, 577 A.2d at 1323, the Appellate Division of the Superior Court of New Jersey held that New Jersey's waste flow directives do not violate the Commerce Clause in that they impose no burden on interstate commerce and are intended to further a basic governmental function by "efficiently removing garbage from New Jersey streets." *Id.* Such factors as rational local planning activities, reduction of truck traffic, the compilation of the waste data necessary for negotiation of long and short-term disposal contracts, and the avoidance of excessive concentrations of solid waste in areas with inadequate disposal capacities, have also been judicially noted as valid governmental objectives served by local waste control laws. *J. Filiberto Inc. v. Dept. of Envir. Prot.*, 857 F.2d at 922; *Matter of Fiorillo Bros. of New Jersey*, 242 N.J. Super. at 679-80, 577 A.2d at 1323; *Elizabeth v. State Dept. of Env.*

Protect., 198 N.J. Super. 41, 486 A.2d 356 (1984).⁴ All of these legitimate governmental objectives warrant the fullest exercise of local police powers.⁵

⁴ Although some courts have remained unpersuaded with respect to the various non-economic benefits achieved by local waste flow control laws, see e.g., *Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775 (D.R.I. 1991), *aff'd* 947 F.2d 1004 (1st Cir. 1991); *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566 (M.D. Ala. 1993), it is respectfully submitted that the correct analysis is that set forth by the Third Circuit and by New Jersey State Courts in the cases cited herein.

⁵ *Pike* balancing clearly demonstrates the validity of local waste flow laws. Some courts, however, have also looked to the market participant exception to Commerce Clause scrutiny, first articulated by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), to uphold local waste management policies. In *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), the Third Circuit used a market participant analysis to uphold a preference for local residents at a County-operated landfill. In *Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist.*, 643 F.Supp. 127 (D.Or.1986), *aff'd* 820 F.2d 1482 (9th Cir. 1987), the market participant doctrine was the basis for upholding a local ordinance restricting access to a district landfill to those within the district. In *Shanye Bros., Inc. v. District of Columbia*, 592 F.Supp. 1128 (D.D.C. 1984), a local restriction with respect to the deposit of only locally collected waste at a city operated disposal facility was upheld under a market participant analysis. The market participant exception was rejected, however, in *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. at 1581, the Court there finding that local restrictions upon private haulers served solely the economic interests of the Southeast Alabama Solid Waste Authority.

C. There are no Adequate Alternatives to Control of Local Waste Flow.

As for Petitioners' contention that alternatives to local waste control exist which will accomplish similar objectives but in a "non-discriminatory" fashion, such contention has no merit nor a factual record to support it. First, as discussed above, local waste flow laws are non-discriminatory in their operation. Secondly, the so-called "adequate" alternatives proffered by Petitioners have all been explored by local government and found wanting. New Jersey certainly needs no further experience with the "competitive" solid waste market of which Petitioners speak, to know that such market is too highly susceptible to anticompetitive behavior of the worst kind to be relied upon as the provider of such essential governmental services as solid waste collection and disposal. New Jersey has learned from its history and does not intend to repeat it. See *Trade Waste Management Association v. Hughey*, 780 F.2d at 223; *State v. New Jersey Trade Waste Ass'n*, 96 N.J. at 25, 472 A.2d at 1059.

As for Petitioners' suggestion that local taxes can be used to subsidize rates at more expensive high-tech local facilities and thus make voluntary use of these facilities more attractive, such suggestion begs the issue. Local governments do not need to learn how to compete with private industry. Local governments are not in solid waste management to lure customers from private enterprise. Local government is in solid waste management because it has to be, and because it has to change the "throw away" mentality which created the solid waste crisis in the first place. Concealing the true costs associated with proper solid waste disposal would do little to

encourage recycling and resource recovery efforts. To merely coax customers into new high-tech, environmentally sound facilities by use of "bargain" rates will only perpetuate the very habits local government is trying to change. Indeed, local government will have served its citizens poorly if all it can accomplish by its efforts in local solid waste management is to teach its citizens to pick the cheapest, most competitive, short-term solid waste disposal option available. However, local government will have served its citizens well if it can compel even the least civic minded of them to support the most responsible and environmentally sound solid waste management and recycling program, the one which will provide for society's solid waste needs today and in the future. Petitioners' insistence on the existence of adequate alternatives to waste flow laws demonstrates a lack of understanding with respect to the difference between mere business objectives and governmental responsibilities.

Finally, this Court in *Fort Gratiot* carefully limited the scope of its ruling striking down a local waste import ban to circumstances not involving the public management of governmentally owned solid waste disposal facilities. In *Fort Gratiot*, this Court noted that no question "concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities" was at issue, only "the validity of the Waste Import Restrictions as they apply to privately owned and operated landfills." 112 S.Ct. at 2023. New Jersey's practical experience in solid waste collection and disposal illustrates that direction of local waste flow is essential to the effectiveness of governmental efforts to provide efficient and environmentally sound solid waste

services. New Jersey urges this Court, therefore, to affirm the authority of local government to direct the flow of locally generated waste.

CONCLUSION

New Jersey urges this Court to uphold as constitutional the Respondent Clarkstown's local waste flow enactment as a legitimate exercise of governmental police powers, evenhanded in its application, untainted by motives of economic protectionism, and entitled to judicial deference.

Dated this 20 day of August, 1993

Respectfully submitted,

ROBERT J. DEL TUFO
 Attorney General of the State
 of New Jersey
 Attorney for Amicus Curiae,
 State of New Jersey
 Division of Law
 124 Halsey Street - 5th Floor
 P.O. Box 45029
 Newark, New Jersey 07101
 Tel.: (201) 648-3124

By: Carla Vivian Bello
 Senior Deputy Attorney General

MARY C. JACOBSON
 Assistant Attorney General
 Of Counsel

CARLA VIVIAN BELLO
 Senior Deputy Attorney General
 Counsel of Record and on the Brief